78-5471

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. _____

RECEIVED
SEP 25 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

THOMAS W. WHALEN,

Petitioner
v.
UNITED STATES OF AMERICA,

Respondent

and

JAMES E. PYNES,

Petitioner
v.
UNITED STATES OF AMERICA,

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioners, Thomas W. Whalen and James E. Pynes, who are now held at Lorton Reformatory in Lorton, Virginia, and who were represented both at trial and on appeal by court-appointed attorneys, ask leave through their undersigned attorneys, to file the attached Consolidated Petition for Writs of Certiorari to the District of Columbia Court of Appeals without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53, ¶1.

W. Gary Kohlman

Henry W. Asbill

W. Gary Kohlman
Henry W. Asbill
Counsel for Petitioners
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
628-1200

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-5471

THOMAS W. WHALEN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

and

JAMES E. PYNES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

RECEIVED
SEP 25 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CONSOLIDATED PETITIONS FOR WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

W. Gary Kohlman

Henry W. Asbill

Public Defender Service
for the District of Columbia
451 Indiana Avenue, N.W.
Washington, D.C. 20001
628-1200

Counsel for Petitioners

INDEX

Page

Opinions Below..... 2

Jurisdiction..... 2

Question Presented..... 3

Constitutional Provision Involved..... 4

Statement Of The Cases..... 4

Reasons For Granting The Writs..... 6

I. THE DECISIONS BELOW AFFIRMING THE TRIAL COURTS' IMPOSITION ON PETITIONER WHALEN OF CONSECUTIVE SENTENCES FOR FELONY-MURDER AND THE UNDERLYING OFFENSE OF RAPE AND ON PETITIONER PYNES FOR FELONY-MURDER AND THE UNDERLYING OFFENSE OF ARMED KIDNAPPING CONFLICT WITH THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AS APPLIED IN PRIOR DECISIONS OF THIS COURT AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT..... 6

II. THE DECISIONS BELOW AFFIRMING THE TRIAL COURTS' IMPOSITION OF CONSECUTIVE SENTENCES ON PETITIONER WHALEN FOR FELONY-MURDER AND THE UNDERLYING OFFENSE OF RAPE AND ON PETITIONER PYNES FOR FELONY-MURDER AND THE UNDERLYING OFFENSE OF ARMED KIDNAPPING CONFLICT WITH THE DECISIONS OF THE HIGHEST COURTS OF SEVERAL STATES WHICH HAVE INTERPRETED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IN THE FELONY-MURDER CONTEXT..... 11

Conclusion..... 12

Certificate of Service..... 12

Appendix A..... 1a

Appendix B..... 16a

Appendix C..... 18a

Appendix D..... 23a

Appendix E..... 24a

Appendix F..... 25a

CITATIONS

Cases	Page
Ashe v. Swenson, 397 U.S. 436 (1970)	10
Bell v. United States, 349 U.S. 81 (1955)	7
Blockburger v. United States, 284 U.S. 299, 304 (1932)	6,7,8
Brown v. Ohio, 432 U.S. 161 (1977)	8,9
Harris v. Oklahoma, 433 U.S. 682 (1977)	8,9
Hilton v. United States, No. 78-5350 (filed September 5, 1978)	1
Ingram v. United States, 122 U.S.App.D.C. 334, 353 F.2d 872 (1965)	7
Newton v. State, 280 Md. 260, 373 A.2d 262 (Md. App. 1977)	11
North Carolina v. Pearce, 395 U.S. 711, 717 (1969)	9
People v. Holiday, 21 Ill.App.3d 796,316 N.E.2d 236 (1974)	11
Prince v. United States, 352 U.S. 322 (1957)	7
Pynes v. United States, D.C.App., 385 A.2d 772 (1978)	7
State v. Adams, 335 So.2d 801 (Fla. 1976)	11,12
State v. Carlson, 5 Wisc.2d 595, 93 N.W.2d 354 (1958)	11
State v. Chambers, 524 S.W.2d 826, 829 (Mo. 1975)	12
State ex rel. Wikberg v. Henderson, 292 So.2d 505 (La.App. 1974)	11
State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972)	11
State v. Woods, 286 N.C. 612, 213 S.E.2d 214 (1975)	11
United States v. Dancy, 166 U.S.App.D.C. 399, 401 n.6, 510 F.2d 779, 781 n.6 (1975)	10
United States v. Greene, 160 U.S.App.D.C. 21, 34, 489 F.2d 1145, 1158 (1973), cert. denied, 419 U.S. 977 (1974)	10
Whalen v. United States, D.C.App., 379 A.2d 1152 (1977), rehearing denied, 388 A.2d 894 (1978)	6,8
CONSTITUTION	
United States Constitution, 5th Amendment	4
MISCELLANEOUS	
Supreme Court Rule 23(j)(5)	1

STATUTES	Page
United States Code	
28 U.S.C. §1257(3)	3
District of Columbia Code	
22 D.C. Code §1801(a)(1973)	4
22 D.C. Code §2101 (1973)	5
22 D.C. Code §2401 (1973)	4,5,7
22 D.C. Code §2403 (1973)	4
22 D.C. Code §2404 (1973)	4,5
22 D.C. Code §2801 (1973)	4
22 D.C. Code §2901 (1973)	4
22 D.C. Code §3202 (1973)	5

RECEIVED
SEP 25 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-5471

THOMAS W. WHALEN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

and

JAMES E. PYNES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

CONSOLIDATED PETITIONS FOR WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS[1/]

Thomas W. Whalen and James E. Pynes petition for writs of certiorari to review the judgments of the District of Columbia Court of Appeals in their respective cases.

1/ Both cases present the same issue and are thus consolidated pursuant to Supreme Court Rule 23(jO(5). Counsel also direct the Court's attention to their Petition For A Writ Of Certiorari in Hilton v. United States, No. 78-5350 (filed September 5, 1978), which presents a variation of the issue raised in the instant Consolidated Petition

OPINIONS BELOW

(Whalen)

The opinion of a division of the District of Columbia Court of Appeals affirming petitioner Whalen's conviction is reported at 379 A.2d 1152 (1977) and is attached hereto as Appendix A, infra, pp. 1a-15a. The separate Order of that court denying petitioner Whalen's Petition For Rehearing Or In The Alternative For Rehearing En Banc is reported at 388 A.2d 894 (1978) and is attached hereto as Appendix B, infra, pp. 16a-17a.

(Pynes)

The opinion of a division of the District of Columbia Court of Appeals affirming petitioner Pynes' conviction is reported at 385 A.2d 772 (1978) and is attached hereto as Appendix C, infra, pp. 18a-22a. The separate Order of that court denying petitioner Pynes' Petition For Rehearing Or In The Alternative For Rehearing En Banc is unreported and is attached hereto as Appendix D, infra, p. 23a.

JURISDICTION

(Whalen)

On January 8-16, 1974, petitioner Whalen was tried by a jury in the District of Columbia Superior Court on a seven count indictment for the felony-murder of one Rebecca Reiser during the course of a rape, robbery and burglary. He was convicted on five counts and was subsequently sentenced on March 4, 1974 to concurrent terms of twenty years to life imprisonment for the felony-murder (rape) and felony-murder (first degree burglary) convictions and fifteen years to life imprisonment for the second degree murder conviction. He was also sentenced to consecutive terms of fifteen years to life imprisonment for the rape conviction and ten to thirty years for the first degree burglary conviction.

On June 18, 1974, Mr. Whalen filed a timely notice of appeal in the Superior Court (copy attached as Appendix E, infra, p. 24a), and in his briefs and oral argument before the District of Columbia Court of Appeals, he challenged, inter alia, the constitutionality of the trial court's sentence. The Court of Appeals, however, affirmed his convictions for felony-murder (rape) and rape on November 10, 1977 and subsequently denied his application for rehearing and/or rehearing en banc on July 14, 1978.

(Pynes)

On November 23-29, 1978, petitioner Pynes was tried by a jury in the District of Columbia Superior Court on a three-count indictment for the felony-murder of one Overton Bonner during an armed kidnapping. He was convicted on all counts and was subsequently sentenced on January 21, 1974 to concurrent terms of twenty years to life imprisonment on each of the murder convictions and to a consecutive term of fifteen years to life imprisonment on the kidnapping conviction.

On January 23, 1974, Mr. Pynes filed a timely notice of appeal in the Superior Court (copy attached as Appendix F, infra, p. 25a), and in his briefs and oral argument before the District of Columbia Court of Appeals, he challenged, inter alia, the constitutionality of the trial court's sentence. The Court of Appeals, however, affirmed his convictions on April 26, 1978 and subsequently denied his application for rehearing and/or rehearing en banc on June 27, 1978.

The jurisdiction of this Court over both cases is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the doctrine of merger of offenses, an integral

part of the Double Jeopardy Clause of the Fifth Amendment to the Federal Constitution, precludes the respective trial courts from imposing consecutive sentences on (1) petitioner Whalen for felony-murder and the underlying offense of rape and (2) petitioner Pynes for felony-murder and the underlying offense of armed kidnapping?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in both cases is the Double Jeopardy Clause of the Fifth Amendment to the Federal Constitution which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASES

(Whalen)

Petitioner Whalen was charged in a fifteen count indictment for, inter alia, the offenses of: (1) felony-murder (rape) (22 D.C. Code §§2401, 2404); (2) felony-murder (robbery) (22 D.C. Code §§2401, 2404); (3) felony-murder (first degree burglary) (22 D.C. Code §§2401, 2404); (4) second degree murder (22 D.C. Code §2403); (5) rape (22 D.C. Code §2801); (6) robbery (22 D.C. Code §2901); and (7) first degree burglary (22 D.C. Code §1801(a)).

At trial, the prosecution's theory was that Mr. Whalen, a maintenance worker at the apartment complex where the victim resided, killed her during the course of a burglary, robbery, and rape. The Government's case was based primarily on the petitioner's fingerprint and thumbprint found in the deceased's apartment and witnesses who placed him at the apartment complex on the morning of the incident.

At the conclusion of the Government's case, the court granted the petitioner's motions for judgment of acquittal as to the felony-murder (robbery) and robbery counts. The jury subsequently returned verdicts of guilty on the remaining five

counts of the indictment. The trial court eventually sentenced the petitioner to concurrent terms of twenty years to life on each of the felony-murder (rape) and felony-murder (first degree burglary) convictions and fifteen years to life on the second degree murder offense. The court also imposed sentences of fifteen years to life for rape, to run consecutively with the murder sentences, and ten to thirty years for first-degree burglary, to run consecutively with both the murder and rape sentences.

(Pynes)

Petitioner Pynes was charged by indictment with counts of: (1) first degree premeditated murder (22 D.C. Code §2401); (2) felony-murder (22 D.C. Code §§2401, 2404); (3) kidnapping while armed (22 D.C. Code §§2101, 3202); and (4) unarmed kidnapping (22 D.C. Code §2101).

At trial, the Government's theory of the case was that Mr. Pynes had killed decedent Bonner in November of 1972 because Bonner was a potential witness against him in an armed robbery that had occurred the previous July. Accordingly, the prosecution introduced evidence concerning both the robbery and the subsequent killing. But for an alleged admission by Pynes to a fellow inmate, Raymond Monroe, the evidence that Pynes killed the deceased was weak and entirely circumstantial. And, Monroe admitted that his main reason for testifying against Mr. Pynes was that the Government authorities had offered to help him with his own pending cases.

After the jury returned verdicts of guilty of all counts, the trial court then sentenced the petitioner to concurrent terms of twenty years to life on each of the murder convictions and imposed a sentence of fifteen years to life on the kidnapping count, to be served consecutively to the sentences imposed for the murder convictions.

REASONS FOR GRANTING THE WRITS

I. THE DECISIONS BELOW AFFIRMING THE TRIAL COURTS' IMPOSITION OF CONSECUTIVE SENTENCES ON PETITIONER WHALEN FOR FELONY-MURDER AND THE UNDERLYING OFFENSE OF RAPE AND ON PETITIONER PYNES FOR FELONY-MURDER AND THE UNDERLYING OFFENSE OF ARMED KIDNAPPING CONFLICT WITH THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AS INTERPRETED IN PRIOR DECISIONS OF THIS COURT AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

In their briefs and oral arguments below, both petitioners contended that the Double Jeopardy Clause precluded any sentence in excess of the mandatory sentence of twenty years to life on the felony-murder charges because the underlying felonies merged into the greater charge. As will be shown below, the lower courts' analyses in rejecting that argument are in conflict with the holdings of this Court and the United States Court of Appeals for the District of Columbia Circuit.

In Whalen v. United States, D.C.App., 379 A.2d 1152 (1977), the petitioner contended that his rape conviction merged into his felony-murder conviction based on the rape charge. The District of Columbia Court of Appeals acknowledged Whalen's argument that the underlying felony (rape) was an "element" of felony-murder and thus that the two offenses would ordinarily merge under the teachings of Blockburger v. United States, 284 U.S. 299 (1932). But, the court mistakenly, however, went on to examine the societal interests protected by the two statutes involved and concluded that because different interests were protected by the rape and felony-murder statutes, no merger occurred. The court further noted that even absent a societal interest analysis, rape was not a lesser included offense of felony (rape) murder because "while the underlying felony is an element of felony-murder it serves a more important function as an intent-divining mechanism." 379 A.2d at 1160.

In Pynes v. United States, D.C.App., 385 A.2d 772 (1978), the petitioner contended that his armed kidnapping conviction merged into his felony-murder conviction based on the kidnapping charge. The Court of Appeals, however, determined that the case did "not involve a single transaction resulting in two crimes, but a series of interrelated acts resulting in two crimes which are defined by separate statutes that are not in pari materia." 385 A.2d at 773. The court further noted that even if the transaction were continuous, the doctrine of merger would be inapplicable "because the transaction offended multiple societal interests and constituted separate offenses." Id. (citations omitted).

The Whalen and Pynes courts' "societal interest analyses" were misguided and led them to incorrect conclusions.[2/] For, if one statutory violation is an "element" of another statutory violation, then for Double Jeopardy purposes, they constitute the "same offense" and thus merge. So much was made

---

2/ The Whalen court's "societal interest analysis" was also unwarranted because once it had determined that the convictions merged under Blockberger, its inquiry should have ended, and the rape conviction should have been vacated. For, it is only where no merger occurs that courts examine the interests involved to determine whether consecutive sentences should nonetheless be barred. See Prince v. United States, 352 U.S. 322 (1957); Bell v. United States, 349 U.S. 81 (1955); Ingram v. United States, 122 U.S.App.D.C. 334, 353 F.2d 872 (1965).

The Pynes court's "societal interest analysis" was unnecessary to its disposition of the case because the court there found that the felony-murder and kidnapping were separate "transactions". But that distinction is without substance, for even as the panel recognized, ". . . proof of the felony substitutes for [proof of] premeditation and deliberation by legislative fiat." 385 A.2d at 773. Moreover, were the murder and the kidnapping not part and parcel of a single transaction, there could have been no conviction for felony-murder since the code requires that the killing occur "in prepetrating or attempting to perpetrate. . . the underlying felony." 22 D.C. Code §2401 (1973).

clear in Blockburger v. United States, supra. The issue there was whether the defendant could be punished twice for violations of two distinct narcotics statutes. This Court responded:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. 284 U.S. at 304.

Blockburger, in other words, permits consecutive sentences only where neither of the two statutory violations in question is a lesser included offense of the other. Blockburger makes equally clear that if the same act or transaction results in two statutory violations and one of them has all the elements of the other, then they are considered "the same offense" because one "merges" into the other.

This Court has recently applied those concepts to factual settings analytically indistinguishable from the cases at bar. In Harris v. Oklahoma, 433 U.S. 682 (1977), the defendant was convicted of felony-murde and, in a separate prosecution, was also convicted of robbery with firearms which was the same felony underlying the felony-murder conviction. This Court, in reversing the second conviction, held that:

> When, as here, conviction for a greater crime, murder, cannot be had without a conviction for the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction for the greater one. 433 U.S. at 684.

And, in Brown v. Ohio, 432 U.S. 161 (1977), the defendant was prosecuted and punished for the crime of stealing an automobile after he had already been prosecuted and punished for the lesser included offense of operating the same vehicle without the owner's consent. This Court again reversed, holding that the Double Jeopardy Clause:

> "protects against a second prosecution for the same offense after

> acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. 432 U.S. at 165.

Accordingly, Harris and Brown, when read together, undeniably support the petitioners' claims that their consecutive sentences for the underlying felonies were improper. For, if two offenses are the same for purposes of barring successive prosecutions, as in Harris v. Oklahoma, supra, and if two offenses are the same for purposes of barring multiple punishments as in Brown v. Ohio, supra, the felony-murder and underlying felonies in the instant cases necessarily are the same for the purposes of barring dual convictions and consecutive sentences in a single prosecution.[3/] Brown v. Ohio, supra, in particular, would seem to control the petitioners' claims. It involves the precise issue presented here - punishment for both a greater offense and a lesser included charge. The fact that Brown v. Ohio, supra, presents the issue after two trials is beside the point. What offended the Double Jeopardy Clause in Brown was not the successive prosecutions, which in many

---

3/ The petitioners direct this Court's attention to the fact that although both Harris v. Oklahoma and Brown v. Ohio were decided more than five months prior to the District of Columbia Court of Appeals' decision in Whalen, and more than ten months prior to the same court's decision in Pynes, there is no mention of those cases in either opinion below.

instances are not constitutionally prohibited, see Ashe v. Swenson, 397 U.S. 436 (1970), but rather the net result that the defendant was twice convicted of the same offense.

The courts' opinions below are also in conflict with two decisions by the United States Court of Appeals for the District of Columbia Circuit, United States v. Greene, 160 U.S. App.D.C. 21, 34, 489 F.2d 1145, 1158 (1973), cert. denied, 419 U.S. 977 (1974), and United States v. Dancy, 156 U.S.App.D.C. 399, 401, n.6 510 F.2d 779, 781 n.6. (1975). In Greene, the appellant was sentenced consecutively for the offenses of rescue of a federal prisoner and a felony-murder which occurred during that rescue. The Circuit Court, in vacating his conviction for the rescue offense, applied the Blockburger test and held that since the charge of felony-murder included every essential element of the rescue charge, there was a merger of offenses, and thus a consecutive sentence for the felony of rescue was improper. And, in Dancy, the Circuit Court relied on its previous decision in Greene and vacated the appellant's conviction for attempted robbery while armed since it was the underlying felony of his felony-murder conviction.

These cases all make it plain what the lower courts here failed to recognize: in every felony-murder prosecution, the underlying felony "merges" into the felony-murder conviction. Those two statutory violations are, for Double Jeopardy purposes, "the same offense", because one (felony-murder) has all the elements of the other (the underlying felony). By proving the underlying felony, the Government proves an element of first-degree murder (with its mandatory 20 years to life imprisonment) that obviate its necessity to establish premeditation and deliberation, the traditional elements of first-degree murder. It is precisely because proof of the felony supplies vital elements of the first degree murder charge that cumulative punishment for both felony-murder and the underlying felony

violates the Double Jeopardy Clause.

The conflicts detailed above justify the grant of certiorari to review the District of Columbia Court of Appeals' judgments in the cases at bar.

II. THE DECISIONS BELOW AFFIRMING THE TRIAL COURTS' IMPOSITION OF CONSECUTIVE SENTENCES ON PETITIONER WHALEN FOR FELONY-MURDER AND THE UNDERLYING OFFENSE OF RAPE AND ON PETITIONER PYNES FOR FELONY-MURDER AND THE UNDERLYING FELONY OF ARMED KIDNAPPING CONFLICT WITH THE DECISIONS OF THE HIGHEST COURTS OF SEVERAL STATES WHICH HAVE INTERPRETED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IN THE FELONY-MURDER CONTEXT.

The District of Columbia Court of Appeals decisions below rejecting the merger doctrine in the felony-murder context are at odds with the decisions of the highest courts of several states. For example, in People v. Holiday, 21 Ill.App. 3d 796, 316 N.E.2d 236 (1974), a case in which the defendant was charged with three counts of murder (first degree, second degree and felony-murder), all arising out of one killing which occurred during the course of an attempted armed robbery, the court held that:

> where the defendant is charged with an attempt to rob that results in a felony murder, sentences cannot be imposed for both offenses. . . . The only permissible sentence is for the more serious offense. . . . 316 N.E.2d at 239. (footnote and citations omitted).

Other instances in which state appellate courts have applied the merger doctrine in the felony-murder context, vacating the conviction for the underlying offense on Double Jeopardy grounds, are: Newton v. State, 280 Md. 260, 373 A.2d 262 (Md. App. 1977) (conviction for attempted robbery vacated); State v. Woods, 286 N.C. 612, 218 S.E.2d 214 (1975) (convictions for kidnapping and rape vacated); State ex rel. Wikberg v. Henderson, 292 So.2d 505 (La.App. 1974) (conviction for attempted armed robbery vacated); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972) (conviction for breaking and entering vacated); State v. Carlson, 5 Wisc.2d 595, 93 N.W.2d 354 (1958) (conviction for arson vacated). Contra, State v. Adams, 335

So.2d 801 (Fla. 1976) (robbery conviction reinstated -- no merger); State v. Chambers, 524 S.E.2d 826, 829 (Mo. 1975) (en banc) (felony murder, stealing -- no merger).

The above-cited state court cases support the petitioners' contentions below and also warrant the grant of certiorari in the instant cases.

CONCLUSION

For the foregoing reasons, writs of certiorari should issue to review the judgments and opinions of the District of Columbia Court of Appeals in both of the cases at bar.

Respectfully submitted,

W. Gary Kohlman

Henry W. Asbill
Public Defender Service
for the District of Columbia
451 Indiana Avenue, N.W.
Washington, D.C. 20001
628-1200

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Consolidated Petitions For Writs Of Certiorari has been served by first class mail, postage prepaid, on the Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, this 25th day of September 1978.

Henry W. Asbill

No. 78-5471

RECEIVED
MAR 17 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

ORIGINAL COPY

THOMAS W. WHALEN AND JAMES E. PYNES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JEROME M. FEIT
ELLIOTT SCHULDER
Attorneys
Department of Justice
Washington, D. C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-5471

THOMAS W. WHALEN AND JAMES E. PYNES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in petitioner Whalen's case (Pet. App. 1a-15a) is reported at 379 A. 2d 1152. The opinion of the court of appeals in petitioner Pynes' case (Pet. App. 18a-22a) is reported at 385 A. 2d 772.

JURISDICTION

The judgment of the court of appeals in petitioner Whalen's case was entered on November 10, 1977; a petition for rehearing was denied on July 14, 1978 (Pet. App. 16a). The judgment of the court of appeals in petitioner Pynes' case was entered on April 26, 1978; a petition for rehearing was denied on July 27, 1978 (Pet. App. 23a). The petition for a writ of certiorari was filed on September 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the imposition of consecutive sentences for felony murder and the underlying felony violates the Double Jeopardy Clause in the circumstances of these cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *.

2. 22 D.C. Code 2401 provides in pertinent part:

> Whoever, * * * kills another purposely either of deliberate and premeditated malice * * * or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

3. 22 D.C. Code 2801 provides in pertinent part:

> Whoever has carnal knowledge of a female forcibly and against her will * * * shall be imprisoned for any term of years or for life.

4. a. 22 D.C. Code 2101 provides in pertinent part:

> Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise * * * shall, upon conviction thereof, be punished by imprisonment for life or for such term as the court in its discretion may determine. * * *.

b. D.C. Code 3202 provides in pertinent part:

> (a) Any person who commits a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon * * * —

> (1) may, if he is convicted for the first time of having so committed a crime of violence in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to life imprisonment * * *.

STATEMENT

1. Whalen

Following a jury trial in the Superior Court of the District of Columbia, petitioner Whalen was convicted on two counts of felony murder (with rape and burglary as the underlying felonies), in violation of 22 D.C. Code 2401; second degree murder, in violation of 22 D.C. Code 2403; rape, in violation of 22 D.C. Code 2801; and first-degree burglary, in violation of 22 D.C. Code 1801(a). He was sentenced to concurrent terms of 20 years to life imprisonment on each felony murder count and 15 years to life imprisonment for second-degree murder, and to consecutive terms of 15 years to life imprisonment for rape and 10 to 30 years imprisonment for first-degree burglary. 1/

The evidence (the sufficiency of which petitioner does not contest) showed that on September 10, 1972, between 10:20 a.m. and 12:30 p.m., petitioner raped and strangled Rebecca Reiser in her room in the McLean Gardens apartment complex in Washington, D.C. (I Tr. 36, 52-58, 62-65; II Tr. 229). Petitioner, a maintenance worker at McLean Gardens,

1/ At the close of the government's case, the court entered a judgment of acquittal on a felony murder count and the underlying robbery count.

was in the general vicinty of the victim's building (II Tr. 123-124, 76-77, 84) and told his co-workers that he had engaged in intercourse with someone at McLean Gardens (II Tr. 136-137). Petitioner's fingerprint and palmprint were later found in the victim's room (III Tr. 326-327, 328-330; IV Tr. 500, 511-512, 521).

The court of appeals reversed the convictions for first-degree burglary and for felony murder in the perpetration of burglary because, it held, the indictment had been improperly amended (Pet. App. 4a-6a). It affirmed the convictions and consecutive sentences for rape and for felony murder in the perpetration of the rape, holding that, because the underlying felony is an "intent-divining mechanism" in the felony murder prosecution, and because the rape and felony murder statutes were meant to protect different "societal interests," the offenses did not merge (id. at 7a-9a). The court vacated the sentence for second degree murder after finding that it was a "lesser included offense of felony murder" (id. at 7a).

2. Pynes

After a jury trial in the Superior Court of the District of Columbia, petitioner Pynes was convicted of premeditated murder and felony murder (with kidnapping as the underlying felony), both in violation of 22 D.C. Code 2401, and of armed kidnapping, in violation of 22 D.C. 2101 and 3202. He was sentenced to concurrent terms of 20 years to life imprisonment on each of the murder counts and to a consecutive term of 15 years to life imprisonment for armed kidnapping.

The evidence established that on November 8, 1972, petitioner and Gregory Neal, who were then under indictment in Maryland for the robbery of Overton Bonner, met Bonner at his place of employment. They tricked him into their car by promising to return the money and property previously stolen from him if Bonner would agree not to testify against them at their robbery trial (I Tr. 261-262). Neal and petitioner then drove Bonner into Rock Creek Park, where they stopped at a picnic grove. Neal produced a gun and ordered Bonner out of the car (I Tr. 262). Outside the car, a struggle ensued between Neal and Bonner; petitioner ran over, grabbed the gun and fired twice at Bonner (I Tr. 262-263). After dropping Neal off at home, petitioner returned to the park and shot Bonner several more times to make sure he was dead (I Tr. 263).

The court of appeals affirmed petitioner's convictions (Pet. App. 18a-22a). The court upheld the consecutive sentences for armed kidnapping and for felony murder with kidnapping as the underlying charge, concluding that Pynes' case involved "not * * * a single transaction resulting in two crimes, but a series of interrelated acts resulting in two crimes which are defined by separate statutes that are not in pari materia" (id. at 19a). In addition, the court held that "the doctrine of merger is inapplicable because the transaction offended multiple societal interests and constituted separate offenses" (ibid.).

DISCUSSION

In each of these cases, the District of Columbia Court of Appeals upheld consecutive sentences imposed upon petitioners for a felony and for felony-murder committed during the course of that felony. The court found that it was the intent of Congress to allow separate punishment for the two offenses and that such action does not violate the Constitution. Petitioners mount no attack on the proposition that the imposition of cumulative punishment comports with the legislative intent. Rather, they contend that the underlying felony is a lesser included offense of felony-murder and that, by virtue of that fact, the Double Jeopardy Clause bars the imposition of cumulative punishments.

The general issue of the constitutionality of cumulative punishment for felony-murder and an underlying felony may be broken down into two components: First, is the underlying felony the "same" offense as felony murder for constitutional purposes (presumably on the basis that it is a lesser included offense); if it is not, then the question of the permissibility of cumulative punishments is purely one of legislative intent. Second, if the underlying felony is the "same" offense, so that successive trials would be barred by the Double Jeopardy Clause (Brown v. Ohio, 432 U.S. 161 (1977)), does the Clause also bar cumulative punishments even if the legislature intended to permit them.

Because the decision in this case appears to be in conflict with decisions of the District of Columbia Circuit and of several state supreme courts, and because decisions of this Court have left some uncertainty regarding the proper disposition of this constitutional issue, we do not oppose review in this case of the claim of petitioner Whalen. For reasons discussed below, we believe the issue is irrelevant to the proper disposition of petitioner Pynes' case and accordingly oppose his request for review.

1. Any inquiry into whether two offenses are the "same" for purposes of the permissibility of cumulative punishments must begin with a consideration of the applicability of the so-called "Blockburger test." See Blockburger v. United States, 284 U.S. 299 (1932). The test was originally articulated as a means of "identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction" (Iannelli v. United States, 420 U.S. 770, 785 n. 17 (1975)), and the constitutional significance of the test has never been fully fleshed out. In essence, the test provides that the criterion for determining identity of offenses is not the evidence actually adduced to prove the offenses in any particular case, but the elements of the offenses: if each offense requires proof of an element that the other does not, the offenses are considered separate under the Blockburger test.

It appears tolerably clear that if offenses are different under the Blockburger test, there is no constitutional impediment to imposition of cumulative punishment so long as such action is consonant with legislative intent. See Gore v. United States, 357 U.S. 386, 392 (1958). If, on the other hand, application of the test leads to the conclusion that the offenses are the same, the constitutional consequences are less clear. In Brown v. Ohio, supra, 432 U.S. at 166, a case involving successive trials, the Court described the Blockburger test as "[t]he established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment * * *." See also Simpson v. United States, 435 U.S. 6, 11 (1978).

Despite the dictum in the Brown opinion, the plurality opinion in Jeffers v. United States, 432 U.S. 137 (1977), handed down

the same day as Brown and concurred in by the author of Brown, seems to suggest that the constitutionality of cumulative punishment for a greater and a lesser included offense is an open question. "The critical inquiry is whether Congress intended to punish each statutory violation separately. * * * * If some possibility exists that the two statutory offenses are the 'same offense' for double jeopardy purposes, however, it is necessary to examine the problem closely, in order to avoid constitutional multiple punishment difficulties." 432 U.S. at 155. Because the Court in Jeffers concluded that Congress did not intend to permit multiple punishments for the offenses there under examination, it was deemed "unnecessary to reach the lesser included offense [punishment] issue" (ibid.).

2. The question whether the legislature may authorize multiple punishment for offenses that -- like rape and felony-murder -- appear quite distinct as a matter of legislative policy but may prove to be the "same" upon subjection to an abstract test evolved by the judiciary arises only if the judicial test in fact classifies the two offenses as the "same" under the particular statutory scheme and other pertinent circumstances of a particular case. 2/

At first blush (and, we believe, upon final analysis), application of the Blockburger test to offenses such as rape and felony-murder appears to lead to the conclusion that the offenses are different. Carnal knowledge is an element of the former but not the latter, whereas felony-murder requires a killing and rape does not.

2/ The question also need not be reached, of course, if, as in Simpson and Jeffers, the legislative history evidences an intent not to permit imposition of cumulative punishment. Here, however, the court of appeals concluded that the felony-murder statute and the rape (or, in Pynes' case, kidnapping) statute were meant to protect distinct social interests and that the imposition of cumulative punishments thus accorded with the congressional intent. We do not understand petitioners to challenge this conclusion; rather, they contend it is irrelevant to the constitutional multiple punishment issue.

Petitioners apply the Blockburger test in a somewhat different manner. Although each offense is defined to include an element that the other does not, they point out, correctly, that a jury could not convict of felony-murder without necessarily finding the defendant to have committed an underlying felony. Thus, they reason, (a) the felony is a lesser included offense of felony murder, (b) a lesser included offense is the "same" offense for double jeopardy purposes as the greater offense, and therefore (c) the two offenses are not different under the Blockburger test and may not be cumulatively punished. Pet. 7-8.

Whether our view or that of petitioners is correct depends upon whether all lesser included offenses are ipso facto the "same" as the greater offense under the Blockburger test, regardless of identity of elements, or whether only necessarily included offenses are the "same". We believe that the latter approach, which clearly produces more sensible results in cases like this (see also point 3, infra), is preferable. There is, however, some support for petitioners' view in this Court's summary reversal in Harris v. Oklahoma, 433 U.S. 682 (1977), which barred a successive trial for the underlying felony after a conviction for felony-murder.

We believe that the result in Harris, which was decided summarily and without any extended analysis of what is a conceptually complex issue, would bear reexamination. In any event, Harris is not necessarily controlling here, because this case involves the Double Jeopardy Clause's restriction against multiple punishments, not successive trials. These two distinct aspects of the Clause involve different interests, and offenses that are deemed the "same" for purposes of barring successive trials may not be so for punishment purposes. As the Court noted in Brown v. Ohio,

supra, 432 U.S. at 165 "the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." Of course, the legislature is no more free than other branches to circumvent the Clause's prohibition against successive trials for the same offense. The legislature may, however, legitimately "circumvent" the prohibition against cumulative punishment for the same offense simply by enhancing the punishment for crimes committed under aggravating circumstances. 3/ Thus a substantial question arises whether offenses that are conceptually the "same" for successive trial purposes should automatically be characterized as the "same" for purposes of imposition of punishment.

3. If petitioners are correct that double jeopardy principles bar multiple punishments whenever the commission of one of a class of offenses is a predicate to conviction of a second offense, the principle would have significant consequences considerably beyond its impact on felony-murder cases. Perhaps the most obvious instance is 18 U.S.C. 924(c), which bars the use of or unlawful carrying of a firearm in the commission of any federal felony. In order to convict for an offense under that provision, the jury necessarily must find the commission of an underlying felony. Thus, under petitioners' analysis, the predicate felony is a "lesser included offense" of the firearms charge, and cumulative punishments,

3/ For example, the legislature could provide that whoever kills another while committing a felony shall be sentenced to a minimum term of from 20 to 35 years' imprisonment and a maximum of life imprisonment. This would accomplish exactly the same result as the present scheme yet would appear to be immune from attack on double jeopardy grounds.

although expressly mandated by Congress, would apparently be constitutionally barred. The same problem may arise with a number of other federal statutes. E.g., 18 U.S.C. 1962 (conduct of enterprise through a pattern of racketeering activity); 21 U.S.C. 848 (continuing criminal enterprise involving substantive narcotics offenses).

Petitioners' position would also render felony-murder statutes virtually useless in many cases (except where the death penalty may be sought). Under the federal statutory scheme as well as that of most states, the presence of the underlying felony serves the narrow function of elevating what would otherwise be second-degree murder into first-degree murder without the necessity of proof of premeditation. See, e.g., 18 U.S.C. 1111(a). If a conviction for felony-murder bars punishment for the underlying felony, the bringing of a felony-murder charge would often actually diminish the amount of punishment to which the defendant is exposed as compared to charging the underlying felony and second-degree murder (which two charges could, even under petitioners' theory, be cumulatively punished). Thus the rule for which petitioners contend subverts the legislative policy of treating murders committed in the course of a felony more seriously than others.

4. While we believe that the decision of the court of appeals is correct, the foregoing discussion indicates that it involves a question of some importance and difficulty that has not been directly addressed or clearly resolved by prior decisions of this Court. In addition, as petitioners correctly note (Pet. 10), the decision conflicts with the disposition of the same issue by the District of Columbia Circuit (e.g., United States v. Greene, 489 F. 2d 1145 (1973), cert. denied, 419 U.S. 977 (1974)); the issue is also the subject of conflicting decisions on federal constitutional grounds among state supreme courts (see cases cited at Pet. 11-12). This disagreement further suggests the propriety of review by this Court.

5. Only the case of petitioner Whalen properly presents this issue for review. Petitioner Pynes was convicted not only of felony-murder, but also of first-degree murder for the same slaying. He received identical concurrent sentences on both murder counts. He does not attack the validity of his first-degree murder conviction, and he could not and does not suggest that armed kidnapping, for which he received a consecutive sentence, is a lesser included offense of first-degree murder. Under these circumstances, the only relief to which he would be entitled would be vacation of the felony-murder conviction. While we believe that the court of appeals should have done this, its failure to do so is of no practical consequence and presents no occasion for review by this Court.

6. Petitioner Whalen's situation is different. He was convicted of rape, felony-murder, and second-degree murder and given sentences totalling 35 years to life imprisonment. His second-degree murder conviction (on which he was sentenced to 15 years to life) was vacated by the court of appeals solely on the ground that it was a lesser included offense of felony-murder (on which he received a concurrent term of 20 years to life). Petitioner now seeks to have the consecutive sentence on the rape charge eliminated. If he is correct that rape and felony-murder are the "same" offense for multiple punishment purposes, the proper course for the court of appeals would have been to vacate the felony-murder conviction and uphold the rape and second-degree murder convictions and sentences. If this Court now agrees with petitioner Whalen and rejects the holding of the court of appeals, it should vacate the judgment of the court of appeals and remand the case, pursuant to 28 U.S.C. 2106, for the purpose of allowing reinstitution of the second-degree murder conviction and sentence.

We note in closing that, at least in the context of felony-murder cases, this decision would have little practical impact in the federal system because of the governing parole statute (18 U.S.C. 4205(a)), which provides that in the case of any sentence or sentences cumulating to more than a maximum of 30 years, the prisoner is eligible for parole after 10 years (obviously the parole release decision itself would not be influenced by the technical "same offense" concepts at issue here, but rather by the conduct underlying th conviction). Because petitioner Whalen has been convicted of offenses under the District of Columbia Code, however, Section 4205(a) is inapplicable, and the outcome of this case would determine whether he must serve a minimum of 30 or of 35 years before becoming eligible for parole.

CONCLUSION

We do not oppose grant of Whalen's petition. The petition of Pynes should be denied.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JEROME M. FEIT
ELLIOTT SCHULDER
Attorneys

MARCH 1979